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FIBER TECHNOLOGIES NETWORKS, L.L.C.)	
140 Allens Creek Road)	
Rochester, NY 14618)	
)	
Complainant,)	
)	
v.)	D.T.E. 01-70
)	
TOWN OF SHREWSBURY ELECTRIC)	
LIGHT PLANT)	
100 Maple Avenue)	
Shrewsbury, MA 01545-5398)	
)	
Respondents.)	
)	

Pursuant to 220 C.M.R. § 1.06(6)(d)(3), Fiber Technologies Networks, L.L.C. (“Fibertech”) appeals the Hearing Officer’s ruling entered on February 14, 2002, (the “ruling”) on Shrewsbury’s Electric Light Plant (“SELP”) motions to compel discovery responses by Fibertech.¹ A copy of this order is attached hereto as Exhibit 1. Fibertech is appealing this ruling because it presents fundamental issues about the scope of this proceeding. As framed by the pleadings and the parties’ positions, this case presents narrow issues concerning the interpretation of M.G.L. c. 166, § 25A. The ruling compels Fibertech to produce information

¹ The discovery requests at issue are SELP 1-6, 1-7, 1-8, 1-12, 1-13, 2-7, 2-8, 2-9, 2-10, 2-11, and 3-14.

relating to Fibertech's customers in other states, their leases, and their construction, and details of Fibertech's business plan² that are not material to these dispositive issues of interpretation.

Background

The ruling arises from information requests by SELP concerning Fibertech's customers in New York, Connecticut, Pennsylvania and other states where Fibertech is building facilities, as well as information requests regarding Fibertech's internal future business plans regarding cable service and local exchange voice, interexchange and data services. During the Prepared Direct Testimony of Frank Chiaino, SELP began with some background on Fibertech. Mr. Chiaino testified that Fibertech has completed networks in New York (Syracuse, Albany, Rochester, Buffalo, Geneva, Batavia, Cortland and Palmyra), in Connecticut (Hartford), and in Pennsylvania (Pittsburgh). Ostensibly based on this background, SELP issued a series of substantially identical information requests, all in one way or another seeking (a) the description of the completed networks, (b) when the construction was completed, (c) whether the fiber has been lit, (d) a list of customers on the completed networks, (e) whether all or part of the network has been leased (and if yes, a description of lease terms), and (f) whether any portion of the completed network has been sold. Fibertech responded completely to subsections (a), (b) and (f) of SELP's requests, partially responded to subsection (c) by informing SELP which segments have been lit, but objecting to identifying specifically which customers have lit what fiber, and partially responded to subsection (e) by stating that all or part of the network has been leased, but objecting to producing a description of the lease terms. Copies of Fibertech's responses to these requests are attached as Exhibits 2 - 12.

On November 20, 2001, SELP filed a Motion to Compel Discovery regarding the responses of Fibertech to SELP 1-6, 1-7, 1-8, 1-12 and 1-13 (attached as Exhibit 13). Fibertech

² See SELP 2-6, 2-7, 2-8, 2-9, 2-10, 2-11, 2-12 and 3-14.

filed an opposition to this motion on November 28, 2001 (attached as Exhibit 14), with a supplemental submission on January 7, 2002 (attached as Exhibit 15). On November 28, 2001, SELP filed a second Motion to Compel Discovery regarding SELP 2-6 and 2-12. Fibertech filed its opposition to this second motion on November 29, 2001 (attached as Exhibit 16). SELP then filed its third Motion to Compel Discovery regarding SELP 2-7, 2-8, 2-9, 2-10, 2-11, 3-11 and 3-14 on January 24, 2002, and responded to Fibertech's letter submission on January 3, 2002 (attached as Exhibits 17 and 18). On January 25, 2002, Fibertech filed an opposition to SELP's third Motion to Compel, incorporating by reference its prior arguments.

Argument

The Hearing Officer granted SELP's motion to compel on the basis that "the information contained in the documents may be relevant to this proceeding. Specifically, the nature of services Fibertech provides to its customers may be relevant to whether Fibertech's attachments are afforded protection under G.L. c. 166, §25A and 220 C.M.R. §§ 45.00, et. seq. SELP's requests may lead to the discovery of admissible evidence." Ruling at p. 4. This ruling fails to state *why* the information sought is relevant.

The record before the Hearing Officer did not support any rationale, because SELP failed to meet its burden to demonstrate relevance. *Cf.* 7 Mass. Practice § 26.3 at 1276 (Mass. R. Civ. P. 26(b)(1) reference to relevance is exclusionary). SELP never demonstrated how the information sought is material to the fundamental questions in the case: whether Fibertech's leasing dark fiber constitutes a "telecommunications service," whether unlit fiber optic cable is "wire or cable for transmission of intelligence by telegraph, telephone or television," and whether a dark fiber carrier that has filed a Statement of Business Operations and tariff pursuant to M.G.L. c. 159, § 19 is a "licensee" within the meaning of M.G.L. c. 199, § 25A. Nothing in

SELP's submissions demonstrated how the information sought would shed light on "whether Fibertech's attachments are afforded protection under G.L. c. 166, §25A and 220 C.M.R. §§ 45.00, et. seq." At a minimum, the requests seek far more information than is relevant to these issues, and therefore are unreasonably burdensome.

I. The Dispositive Legal Issues Can Be Decided Without The Information Sought.

The information requested in SELP's several information requests is irrelevant to the threshold issue to the case: whether Fibertech, as a wholesale provider of dark fiber facilities, is qualified as a "licensee" for purposes of G.L. ch.166 § 25A. SELP purportedly denied Fibertech's request for pole attachments on the basis that a dark fiber provider is per se disqualified as a "licensee" for purposes of G.L. c. 166 § 25A. SELP has denied Fibertech access to its poles on the purported basis that a dark fiber carrier cannot be a licensee within the meaning of G.L. c.166 §25A. *See Response of Shrewsbury's Electric Light Plant* (filed September 17, 2001) ¶28 ("SELP specifically denies that Fibertech's business of leasing dark fiber constitutes a 'telecommunications service' or that Fibertech actually 'transmits' intelligence by telephone or electricity"); further answer ¶ 4 ("Fibertech is not incorporated for the transmission of intelligence by electricity or telephone because '[d]ark fiber' means fiber that is not connected to any equipment capable of transmitting information"); ¶ 7(Fibertech is not a "licensee" because it "does not offer its dark fiber 'service' to the general public"); ¶ 8 ("Fibertech is not a 'licensee' within the meaning of G.L. c. 166, §25A and C.M.R. 45.02").³

Fibertech, on the other hand, contends that the fact that it is authorized as a common carrier pursuant to G.L. c. 159 § 12 by virtue of meeting the DTE's entry requirements is

³ Since the pleadings in this case, the Supreme Court has overturned the *Gulf Power* decision on which SELP relied. *National Cable & Telecommunications Inc. v. Gulf Power Co.*, __ U.S. __, No. 00-832 (Jan. 16, 2002) (reversing 208 F.3d 1263 (11th Cir., 2000)).

dispositive of its status as a “licensee” pursuant to M.G.L. c. 166, § 25A⁴ and as a “telecommunications provider” for purposes of 47 U.S.C. § 224. The premise of each of these positions is undisputed. Fibertech acknowledges that it currently provides only dark fiber and does not provide the electronics necessary to “light” the fiber; thus, SELP does not need further discovery to establish the undisputed fact that Fibertech offers fiber that is dark.⁵ Likewise, the fact that Fibertech has filed a Statement of Business Operations and tariff with the Department is undisputed (and subject to administrative notice by the Department).

Although Fibertech can demonstrate if necessary that its services are an important segment of the competitive marketplace 220 C.M.R. 45.00 is meant to foster and that SELP’s exclusion of Fibertech is blatantly anticompetitive and discriminatory, Fibertech also believes the case can be resolved on the narrower issues. The discovery at issue is therefore an excursion away from the central material issues presented by this case. As a result, it is not calculated to produce any evidence admissible on these issues, nor will it “reduce hearing time” or “narrow the scope of issues.” 220 C.M.R. § 1.06 (6)(c)(1).

II. SELP Has Not Articulated What Admissible Evidence The Information Sought May Be Calculated to Produce.

As stated in the ruling, the purpose of discovery is to “facilitate the hearing process by permitting the parties and the Department of Telecommunications and Energy (“Department” or “DTE”) to gain access to all *relevant* information in an efficient and timely manner” (emphasis added). SELP argues in general terms that customer agreements may shed light on Fibertech’s business plans, but this argument fails to demonstrate the connection between any such facts and

⁴ M.G.L. c. 166, § 25A defines a licensee as “any person, firm, or corporation other than a utility, which is authorized to construct lines or cables, upon, along, under and across the public ways.”

⁵ That Fibertech is a dark fiber provider is an established fact: it is stated in Fibertech’s Complaint of August 27, 2001; it is acknowledged in SELP’s September 17, 2001 Response and SELP’s October 22, 2001, Proposed Procedural Schedule; and asked and answered in several SELP information requests (SELP 1-6, 1-7, 1-15, 2-7, 2-8 and 2-9).

the contentions SELP makes in this case, and fails to demonstrate how the information SELP seeks is reasonably calculated to lead to the discovery of admissible evidence. For example, in its motion to compel SELP states “SELP would be interested in learning whether these leases (or agreements or contracts) require Fibertech’s ‘customers’ to make payment or take service as of the date of execution of the contract, or at some later date.” Although the requested leases may be “interesting” to SELP, SELP makes no connection between the information it seeks and the issues of this case.

Massachusetts law on relevance is embodied in Proposed Massachusetts Rule of Evidence 401, which defines relevant evidence as “evidence having any tendency to make the existence of the determination of the action more or less probable than it would be without the evidence.” *See* Liacos, Brodin & Avery, *Handbook of Massachusetts Evidence* § 4.1.1 at p. 108 (1999) (quoting *Commonwealth v. Fayerweather*, 406 Mass. 78, 83 (1989) (relevant evidence has a “rational tendency to prove an issue in the case”)). SELP has not shown what fact of any consequence to the determination of this case it hopes to find in Fibertech’s customer agreements much less any of the customer information encompassed by its requests, or what issue any such information would have a “rational tendency to prove.” Nor does SELP show how any set of facts it may hope to discover makes it more or less likely that Fibertech is a “licensee” for purposes of G.L. c. 166 § 25A. SELP therefore has failed to meet its burden.

On the other hand, Fibertech has repeatedly shown how the information sought is irrelevant to this case.⁶ The agreements between Fibertech and its present customers involve facilities that are presently outside of Massachusetts. The requests all ask for extensive information concerning the wholesale customers and their business operations over Fibertech’s

⁶ *See* Fibertech’s November 28, 2001 opposition to SELP’s Motion to Compel, Fibertech’s November 29, 2001 opposition to SELP’s Motion to Compel, and Fibertech’s January 25, 2002 opposition to SELP’s Motion to Compel.

facilities, including marketing plans and engineering plans that are competitively sensitive and in the case of engineering, sensitive for security reasons as well. None of this information will alter the fact that what Fibertech offers these customers is dark fiber. When, if, and how Fibertech may offer voice, data, or cable television services on a retail basis in the future shed no light on whether, under M.G.L. c. 166, § 25A, Fibertech is currently “authorized to construct lines or cables upon, along, under and across the public ways” – and therefore a “licensee” – or whether dark fiber is wire or cable for “transmission of intelligence” – and therefore an “attachment.”

III. Even If Some of The Information Sought is Relevant, SELP’s Requests As a Whole Are Overly Burdensome .

The documents sought by SELP contain confidential and proprietary information and range far and wide through not only Fibertech’s relationships with customers, but also those customers’ own businesses.⁷ The mere fact that Fibertech and SELP are willing to enter into a nondisclosure agreement does not obviate the requirement of relevance or the burden of compiling the requested information. Each individual request still must meet all of the criteria set forth in 220 C.M.R. § 1.06(6)(c)(1) and Rule 26 of the Massachusetts Rules of Civil Procedure. Because the information sought does not meet these criteria, the fact that both parties are willing to enter into a non-disclosure agreement is not dispositive.

Even if Fibertech were to accept that some of the requests are relevant, it is evident that not all of the information sought is relevant. SELP 1-6, SELP 1-7, SELP 2-6, SELP 2-7 (d) and (e), SELP 2-8 (d) and (e), SELP 2-9 (c) and (e), SELP 2-10 (a) and (b), SELP 2-11 and SELP 2-12 seek all of the leases Fibertech has with its customers in their *entirety*. For example:

SELP 1-6 Please refer to Paragraph 4 of the Complaint.
(a) Does Fibertech currently have any signed leases for its “dark fiber for use by communications carriers?”
(b) If so, please provide copies of such leases.

⁷ See Fibertech’s November 28, 2001 opposition to SELP’s Motion to Compel.

SELP 1-7 Please provide all copies of all documents concerning Fibertech's "dark fiber" customers, including terms and condition and rates for services offered.

SELP 2-12 Please refer again to Mr. Chiaino's testimony at page 4. Please provide copies of Fibertech's agreements with Choice One, AT&T, Allegiance, CTC, Global Crossings, Connecticut Telephone, and the State of Connecticut.

In no way are any of the entire leases, customer names, or the number of route miles in each city in New York and Connecticut relevant to the material issues of this Massachusetts case. SELP 1-7 asks without limit for copies of "all documents" concerning Fibertech's customers. This broad request is not limited to the lease agreements, but is including any and all correspondence between Fibertech and its customers. This information reaches far beyond the scope of this proceeding. As for the remaining requests regarding Fibertech's agreements with its customers, if the Department determines that Fibertech's lease agreements are relevant to the material issues in this case, and therefore compels Fibertech to respond to SELP's requests, the customer agreements should be substantially redacted, so as to not include any information regarding lease rates, customer names, the number of route miles in each city, or the term of each lease.

SELP 3-14 seeks to find out if the customer agreements are privately-negotiated contracts by asking:

SELP 3-14 Please refer to page 20 of Mr. Lundquist's testimony.

(a) Are the Choice One Master Facilities and other Agreements that Fibertech has with its customers privately negotiated contracts?

(b) If the answer to SELP 3-14(a) is yes, please describe whether the provision of dark fiber under such arrangements constitutes the offering of dark fiber on a "common carrier" basis.

The terms on which Fibertech is doing business outside of Massachusetts do not establish whether it is meeting the requirements of G.L c 166, § 25A as contended. Moreover, even if these were relevant to Massachusetts and did constitute “privately negotiated contracts,” the Department has recognized that past private carrier contracts are not an obstacle to common carrier status, as the Appeals Court recently reaffirmed. *Yankee Microwave, Inc. v. Petricca Communications Systems, Inc.*, Docket No. 98-P-559, slip op. at p. 7 (Mass. App. Ct., Jan. 7, 2002) (citing MFS-McCourt, D.P.U. 88-229/252, p. 10 (1989)). Therefore, Fibertech should not be compelled to respond to SELP 3-14.

SELP 1-8 and SELP 1-12 request *all* documents concerning Fibertech’s local exchange voice, interexchange and data services customers, and also requests *all* documents that would lead Fibertech to offer such services. These two requests are unnecessary. Any documents relating to Fibertech’s local exchange voice, interexchange and data service customers have no bearing on the issues in this case. In addition, it is irrelevant whether or not Fibertech may offer such services in the future. Assuming however, that the Department found that the documents requested in SELP 1-8 and 1-12 were relevant and ordered Fibertech to produce them, the documents should only be produced after an appropriate confidentiality agreement is reached between the parties. The requested documents contain competitively sensitive and highly confidential information regarding competitor information and business strategies. For all of the reasons stated above, the blanket order established by the Hearing Officer’s Ruling is not only burdensome, but it is also unreasonable and unjustifiable.

CONCLUSION

For all of the reasons set forth above, Fibertech requests that the Department reverse the Hearing Officer’s Ruling of February 14, 2002, in whole or in part.

Respectfully submitted,

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